United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,221

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 4 1958
Joseph W. Stewart
CLERK

CLAUDE R. ALLEN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

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JOINT APPENDIX

262 [Filed in Open Court, February 18, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled December 27, 1956, Sworn in January 2, 1957

The United States of America	)	Criminal No. 156-57
	)	
v.	)	Grand Jury No. 25-57
	)	
Lawrence Dorman	)	Unauthorized Use of Vehicle
Thomas M. Butler	)	(22 D.C.C. 2204)
Claude R. Allen	)	

The Grand Jury charges:

On or about December 21, 1956, within the District of Columbia, Lawrence Dorman, Thomas M. Butler and Claude R. Allen feloniously did take, use, operate and remove the automobile of Evelyn M. Johnson, in the custody of Jesse M. Ricks, from a lot and did operate and drive said automobile for their own profit, use and purpose without the consent of Evelyn M. Johnson, the owner of said automobile, and without the consent of Jesse M. Ricks.

/s/ Oliver Gasch
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:
/s/ Daniel L. Harbour
Foreman.

264

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed March 1, 1957]

UNITED STATES

vs. Criminal No. 156-57

Claude R. Allen Charge UUV

Defendant

PLEA OF DEFENDANT

On this 1st day of March, 1957, the defendant Claude R. Allen, appearing in proper person and by his attorney Sidney A. Cohen, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto. The defendant is remanded to the D. C. Jail.

By direction of
Charles F. McLaughlin
Presiding Judge
Criminal Court #Two

HARRY M. HULL, Clerk
By /s/ Richard Kane

Present:

United States Attorney

By A. Hantman
Assistant United States Attorney

E. Sweeney
Official Reporter

265 [Filed May 6, 1957]

PROPOSED INSTRUCTION SUBMITTED ON BEHALF OF CLAUDE R. ALLEN

Along with the usual instructions given in a case such as this, including instructions dealing with evaluation of circumstantial evidence, defendant Allen requests that the following instruction also be given:

If the evidence does not convince you beyond a reasonable doubt that Defendant Allen had possession of the vehicle in question, then you may not find him guilty of this alleged offense but you must find him not guilty. Now the word, "possession," has a particular meaning in the law. It means such actual, exclusive control as the nature of the thing admits. Simply, it means power of control over the involved vehicle. If you do not find that possession in Allen, that is, that he had the power of control over this vehicle, that he had such actual, exclusive control over it as its nature admitted, then you must find Defendant Allen "not guilty."

(And as authority for the proposed instruction, defendant Allen submits those authorities already of record included within his "Motion for directed verdict of acquittal.")

Respectfully submitted,

/s/ Sidney A. Cohen
Attorney for Defendant Allen

Denied
C.F.M.
Judge

---

266 [Filed May 6, 1957]

MOTION FOR DIRECTED VERDICT OF ACQUITTAL

The above named defendant moves this Honorable Court to direct a verdict of acquittal on his behalf on the grounds that the Government has failed to offer to prove or to prove that he is a person who did "take, use, operate, or remove . . . an automobile or motor vehicle . . . and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose," as is set forth as a necessary element under the involved

statute, Title 22, Section 2204 of the D. C. Code, and in particular on the grounds that he was never in possession of said or any automobile here involved and that there is no proof offered or made that he was and that therefore no inference of unauthorized use may be raised as to him.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION
FOR DIRECTED VERDICT OF ACQUITTAL

Barfield v. United States, 229 F2d 936, CA5.
Edwards v. United States, 139 F2d 365, CADC.
Epps v. United States, 157 F2d 11, CADC.
Gilbert v. United States, 215 F2d 334, CADC.
Holmes, The Common Law, p. 246.
Pearson v. United States, 192 F2d 681, CA6.
Pollock, Genius of the Common Law, p. 120.
Tractenberg v. United States, 293 F 476.
267 United States v. Curzio, 170 F2d 354, CA3.
United States v. Wainer, 170 F2d 603, CA7.
Williams v. United States, 215 F2d 35, CADC.
Wilson v. United States, 162 U.S. 613.
Wright v. United States, 189 F2d 699, CADC.

And, in addition, defendant cites the texts and cases cited in the above texts and cases.

Respectfully submitted,
/s/ Sidney A. Cohen
* * * * * * *
Attorney for defendant Allen

---

268 [Filed May 6, 1957]

On this 6th day of May, 1957, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon motion of defendant #3

for directed verdict of acquittal heard and denied, filed; thereupon proposed instructions to jury submitted on behalf of defendant #3 denied, filed; whereupon the said jury after hearing further of the evidence and the instructions of the Court, alternate jurors Angelo V. Pappandreau and George A. Ledrick, are discharged from further consideration in this case; and thereupon the jury retires to consider their verdict.

The jury returns into Court and upon their oath say that each defendant is guilty as indicted.

Each defendant is referred to the Probation Officer of the Court and each deft. is remanded to the District of Columbia Jail.

By direction of
CHARLES F. MCLAUGHLIN
Presiding Judge
Criminal Court #Two

HARRY M. HULL, Clerk

Present:
United States Attorney
By Joseph Hannon
Assistant United States Attorney
Ida Z. Watson
Official Reporter

By /s/ Hugh E. Kline
Deputy Clerk

---

269 [Filed July 1, 1957]

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL

---

200 19th St., S.E.
Washington, D.C.

June 18, 1957

Chief Justice
Bolitha J. Laws
U.S. District Court
District of Columbia

Honorable Sir:

This motion pertaining to Criminal Case No. 156-57 is intended to try and show just cause why the verdict of guilty for the crime of un-authorized use of a motor vehicle, namely, an automobile and the sentence of, from 1 to 3 years should be set aside and a new trial rendered in my behalf (one) Claude R. Allen. The previous findings and sentence was passed on May 17, 1957 by Hon. Judge Charles F. McLaughlin.

The indictment for the above mentioned crime stated that I, Claude R. Allen, with two co-defendants, did take, use, and operate said automobile for my own use and benefit. I contend to show the prosecution failed to prove any part of the indictment. The facts and findings of the Transcript as to the trial proceedings will show (1) I was not in said automobile, but approximately 40 or 50 feet away (2) There was no fingerprints or evidence to show that I had been in or near said automobile (3) Co-defendant one Thomas M. Butler, who was arrested in the automobile testified under oath, that I was not in or had not previously been in said auto (4) A white envelope said to contain title to automobile, was never produced but the title was in evidence (5) There
270 was three arresting officers but only two was ever at trial or was ever mentioned. One, Officer Cochran, the officer who was not present at the trial or preliminary hearing stated after I was first arrested that he did not see me near or in the vicinity of the automobile, but only after Det. Sgt. Shelton moved me from about 40 or 50 feet away and placed me with the other two co-defendants.

At the preliminary hearing Det. Sgt. Shelton admitted to the distance I was from the automobile when he arrested me, but at the trial proceedings he, Det. Shelton denied, under oath, that he arrested me and said that he arrested Thomas Butler, a co-defendant. There was not a transcript of the hearing, and I did not have Council at the time of the hearing. Therefore, I was unable to prove Det. Sgt. Shelton's two different statements.

I contend that all persons involved in this case, whether they are for the defendants or against the defendants should have made their appearances in court for the trial, and that the above mentioned facts should weigh enough for me to be granted a new trial.

/s/ Claude R. Allen

Respectfully submitted,
/s/ Claude R. Allen
200 19th St., S.E.
Washington, D.C.

[JURAT]

271

200 19th St., S.E.
Washington, D.C.
May 26, 1957

Judge Charles McLaughton
U.S. District Court

Dear Sir:

I am writing you with hopes that you will give my request great consideration. I was tried in your court on the 6th day of May of this year and sentenced the 17th day of May for the offense of Unauthorized Use of an Automobile. Before I was sentenced, I had been confined here in the D.C. Jail from Dec. 21, 1956 until May 17, 1957. What I am asking you to do, is, please give me credit for the time spent in Jail while awaiting trial and sentencing. Which amounts to 4 months and 27 days. I was wrongly accused of this crime and was convicted on circumstantial evidence which was more than doubtful. My conviction was based on my friendship with the person whom was in the automobile. Not because I was in it, or ever had been it. I believe there are grounds for an appeal, but since I am not too familiar with the different Sections or articles of Law, I am handicapped. In the meantime I have to do the best that I can in trying to prove my innocence. Thanking you in advance.

Sincerely,
/s/ Claude R. Allen

272

200 19th St., S.E.
Washington, D.C.

June 21, 1957

Hon. Judge Charles F. McLaughlin
U.S. District Court
District of Columbia

Hon. Sir:

This letter is pertaining to Criminal Case No. 156-57 in which the Govt. vs. Claude R. Allen et al. for the offense of Un-Authorized Use of a Motor Vehicle, namely an automobile.

I, one Claude R. Allen, was tried and convicted in your court and sentenced on May 17, 1957 for a period of from 1 to 3 years. I don't feel justified in my conviction because the prosecution failed to prove any part of my indictment, which stated that, I did take, use, and operate said auto for my own benefit without the owner's consent (1) I was never in said automobile, and there was no witness to say that I had been (2) There was no fingerprints inside or outside auto that were mine (3) Co-defendant Thomas M. Butler, who was in auto, stated under otah, that I was not, and had not previously been in said auto (4) One of the three arresting officers, a Mr. Cochrane, whom had denied seeing me near auto at the time of my arrest, failed to appear in court, either at pre-

273 liminary hearing or trial proceedings.

I do believe that the facts of this case warrants me an appeal. But due to my financial conditions, I am unable to fight this case, as it should be fought.

How the jury brought in a verdict of guilty, I don't know, but I do know that I am innocent of the charge, and I am begging you to please take in consideration all of the facts of the proceedings of my case and please grant me a reduction of my sentence. I also had been confined 4 months and 27 days before I received this sentence.

Thanking you in advance, and hoping to hear from you soon.

Respectfully

/s/ Claude R. Allen

274 [Filed June 28, 1957]

DEFENDANTS' MOTION TO SET ASIDE VERDICT AND GRANT A NEW TRIAL, IS BY THE COURT OVERRULED

On this 28th day of June, 1957, came the attorney of the United States; each defendant in proper person and by their attorneys Victor Mercogliano and Sidney A. Cohen, Esquire; whereupon the defendants' motion to set aside verdict and grant a new trial, coming on to be heard, after argument by counsel, is by the Court overruled.

Each defendant is remanded to the District of Columbia Jail.

By direction of
CHARLES F. MC LAUGHLIN
Presiding Judge
Criminal Court #Two
HARRY M. HULL, Clerk
By /s/ Hugh E. Kline

Present:

United States Attorney

By Joseph Hannon
Assistant United States Attorney

Ida Z. Watson
Official Reporter

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275 [Filed May 22, 1957]

JUDGMENT AND COMMITMENT

On this 17th day of May, 1957 came the attorney for the government and the defendant appeared in person and by counsel Sidney A. Cohen

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of Unauthorized Use of a Vehicle as charged and the court having asked the defendant whether he has

anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year to Three (3) years

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Charles F. McLaughlin
United States District Judge

---

277 [Filed October 9, 1957]

NOTICE OF APPEAL

Name and address of appellant Claude R. Allen
Box 25, Lorton, Va.

Name and address of appellant's attorney

Offense UNAUTHORIZED USE OF VEHICLE (22 DCC 2204)

Concise statement of judgment or order, giving date, and any sentence Sentenced to imprisonment for a period of One (1) year to Three (3) years, May 22, 1957.

MCLAUGHLIN, J.

Name of institution where now confined, if not on bail

Lorton Reformatory
Lorton, Virginia

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

October 9, 1957

CLAUDE R. ALLEN, Appellant
Attorney for Appellant

---

1 [Filed November 13, 1957]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
May 3, 1957

The above-entitled matter came on for hearing before the HONORABLE CHARLES F. McLAUGHLIN, United States District Judge, at 11:15 a.m.

APPEARANCES:

JOSEPH HANNON,
Assistant United States Attorney,
Counsel for the Government

VICTOR MERCOGLIANO, Esq.,
Counsel for Defendant Dorman

J. J. DWYER, Esq.,
Counsel for Defendant Butler

SIDNEY A. COHEN, Esq.,
Counsel for Defendant Allen

* * * * * *

12 EVELYN M. JOHNSON

was called as a witness by and on behalf of the Government * * *

DIRECT EXAMINATION

BY MR. HANNON:

* * * * * *

13 Q. On December 21, 1956, were you the owner of an automobile at that time? A. Yes, I was.

Q. And what type of automobile was that, please? A. Forty-six Buick.

* * * * * *

Q. Mrs. Johnson, could you tell us what the tag number was? A. At that time, the tag number was AW-42-46.

* * * * * *

14 Q. Mrs. Johnson, I will show you Government's Exhibit No. 1, marked for identification, and ask you if you will examine it, please? A. This is my title.

* * * * * *

15 Q. On December 21, 1956, who had your automobile on that date?

A. Jesse Ricks.

* * * * * *

Q. Mrs. Johnson, how did he come to have your automobile on that date? A. When I bought the automobile, I was learning to drive; and after I tried several times to get my permit, I failed. So I decided to sell the car
16 to Jesse Ricks, but he hadn't finished paying for the car, and that is the reason why he had the car.

Q. On December 21, 1956, you allowed him the use of the automobile? A. Yes, I did.

* * * * * *

Q. Now, Mrs. Johnson, I will ask you to look at the three Defendants sitting here at counsel table, and tell His Honor and the ladies and gentlemen of the Jury whether you know any of the three gentlemen? A. No, I don't.

* * * * * *

26 REDIRECT EXAMINATION

* * * * * *

27 Q. Prior to December 21, Mrs. Johnson, where did you last see the title to your automobile? Where was it when you last saw it? A. December 21?

* * * * * *

Q. Before the car was taken, where did you last see it? A. In the glove compartment where I had put it.

* * * * * *

35 JESSE E. RICKS

was called as a witness by and on behalf of the Government * * *

DIRECT EXAMINATION

BY MR. HANNON:

* * * * * *

36 MR. HANNON: Mrs. Johnson, will you stand up, please?

BY MR. HANNON:

Q. Mr. Ricks, do you know this young lady that is standing in the courtroom? A. Yes, sir, I do.

Q. All right. What is her name? A. Her name is Evelyn Johnson.

Q. And to your knowledge, sir, on December 21, 1956, did she own an automobile? A. Yes, sir.

Q. What kind of an automobile was that? A. It was a black Buick sedan, four-door sedan.

* * * * * *

Q. Now, on December 21, sir, 1956 -- on December 20, 1956, do you
37 know who had Mrs. Johnson's automobile? A. I had it.

* * * * * *

Q. And while you had it, you were paying Mrs. Johnson for it; is that correct? A. Yes, that is right.

Q. Now, Mr. Ricks, I direct your attention to December 20, 1956.
38 Had you used the automobile that day? A. Yes, sir. I driven it to work and back.

Q. Did there come a time, sir, when you parked the automobile? A. Around six o'clock.

Q. Six o'clock on December 20? A. Yes, sir.

Q. Where did you park it, sir? A. I parked it on the parking lot between the apartment, behind Brown's Court.

Q. Would that be the 400 block of Brown's Court? A. Yes, sir.

Q. And that is Northwest, District of Columbia; is that correct? A. Northwest, yes, sir.

Q. Now, after you parked it, and more particularly, on the early morning hours of December 21, 1956, that is, the following morning, state whether or not the officers from the Metropolitan Police Department had occasion to call you? A. Yes; they called me around six o'clock.

* * * * * *

40 Q. Before you went down to Headquarters, state whether or not you had occasion to go to the 400 block of Brown's Court, N.W., where you said that you had parked this car, to look to see whether the car was there? A. Well, I did.

Q. Was the car there, sir? A. No, sir.

* * * * * *

Q. Now, Mr. Ricks, at the time that you parked the car on Brown's Court, N.W., in the District of Columbia, on December 20, in the evening, do you recall how much gasoline was in the tank, sir? A. I had around

a fourth of a tank.

* * * * * *

41 Q. When was the next time, sir, that you saw this automobile? A. On the 21st.

Q. At about what time, sir? A. Around seven-thirty next morning, down at Headquarters in the basement.

Q. In the basement of the Headquarters? A. Yes, sir.

Q. Did you have occasion at that time, sir, to look at the gasoline gauge of that automobile? A. I did.

Q. And how much gas was in the automobile at that time? A. Half full.

* * * * * *

42 Q. Was there anything unusual or different about the car then?

A. There were.

Q. What was that, sir? A. A glass broke in the window, little window on the lefthand side, on the driver's side.

Q. Of the front door? A. On the front door.

* * * * * *

43 Q. Mr. Ricks, with respect to the ignition on this 1946 Buick sedan, can you take the key out of the ignition without locking the ignition?

* * * * * *

44 A. Yes, sir. The switch was left unlocked.

* * * * * *

54 REDIRECT EXAMINATION

BY MR. HANNON:

* * * * * *

56 Q. Do you know where that title was, sir? A. Yes, sir.

Q. Where was it? A. In the glove compartment.

* * * * * *

65 RECROSS EXAMINATION

BY MR. DWYER:

* * * * * *

66 Q. Did anybody tell you anything about the wires being crossed? A. Did anybody tell me about it?

Q. Yes, sir. A. I was shown some wires in the front seat. The officer showed me the wire on the front seat.

* * * * * *

Q. He showed you wires in the front seat? A. Showed me wires, raincoat, distributor, baby carriage, all other things in there. I helped bring them back up.

* * * * * *

68 WILLIAM R. SHELTON

was called as a witness by and on behalf of the Government * * *

DIRECT EXAMINATION

BY MR. HANNON:

* * * * * *

Q. Are you a Detective Sergeant assigned to the Auto Squad? A. That is correct.

69 Q. Were you so assigned on December 21 of 1956? A. Yes, sir.

Q. And Sergeant Shelton, I direct your attention to that date, and ask you whether you will tell His Honor and the ladies and gentlemen of the Jury where you were about 4:00 a.m. on that date? A. We were in Cruiser 56, assigned to the Automobile Squad.

Q. When you say, "we," whom do you mean? A. Officer Kunmann, Al Kunmann and Officer Cochran of No. 2 Precinct, and myself.

* * * * * *

THE WITNESS: We were in Cruiser 56, crusing north on Second Street in the 1000 block, N.E., around 4:00 a.m. on the morning of

70 December 21.

BY MR. HANNON:

Q. Sergeant Shelton, about that time, did you have occasion to observe anything of an unusual nature? A. Yes, sir.

Q. Would you tell us what that was, please? A. I observed the Defendant Dorman, who is seated in the middle --

* * * * * *

THE COURT: * * *

Proceed.

THE WITNESS: I saw him standing alongside of a truck parked in the 1000 block of Second Street, N.E. I saw the Defendant Allen, who is sitting next to his attorney with the blue jacket, standing near the right rear fender of a Buick, which was parked in the 1000 block, approximately forty or fifty feet behind the truck at which the Defendant Dorman was standing.

MR. HANNON: May the record show Sergeant Shelton has identified
71 Defendant Allen?

THE COURT: The record --

MR. COHEN: Would you point to that Defendant?

THE WITNESS: Seated to your right, sir.

THE COURT: The record may so show. Proceed.

THE WITNESS: In the Buick, seated behind the steering wheel, was the Defendant seated alongside of his counsel.

* * * * * *

MR. HANNON: May the record show that Sergeant Shelton has identified the Defendant Butler?

* * * * * *

THE WITNESS: At the time that I saw them, the Defendant Dorman started to walk away from the side of the truck which was the street side. The Defendant Allen started to walk -- both starting to walk north on Second Street. Allen was between the car and the railroad tracks, which is a wall there; and it is not a sidewalk; it is grass area. And --

BY MR. HANNON:

Q. Sergeant Shelton, where are these railroad tracks with respect --
72 A. They are elevated above the street and there is a concrete wall; then there is a grass area; and then a curbing; and then a street; and there is a lightpost right at the rear of the right rear fender of the Buick.

* * * * * *

74 Q. Now, Officer Shelton, if you will describe the Buick automobile that you observed? A. It was a 1946 Buick, bearing D. C. registration AW-42-46.

* * * * * *

75 Q. Now, what time of morning was this, Sergeant Shelton? A. That
76 I made the statement?

Q. That you observed the Defendants. A. Four a.m.

* * * * * *

Q. Where was the truck in relation to where the Buick -- was the Buick parked, sir? A. To the curb, west curb.

* * * * * *

77 Q. What did you do when you came into the area where the Buick was parked, sir? A. I stopped at the rear of the Buick and I saw the smoke coming out of its exhaust; and when I stopped, the Buick lunged forward about two feet and choked, stopped.

Q. Did you get out of the cruiser at that time? A. Yes, sir.

Q. What did you do when you got out of the cruiser, Officer Shelton? A. I went down -- Officer Kunmann called the Defendant Allen and the Defendant Dorman, and he went over and talked to them.

Q. At the time that he called them, where were they? A. They had started north on the grass area between the parked cars and the railroad tracks.

Q. What was it that you did at that time? A. I went down and I spoke to the guy, Butler, who was behind the wheel, and then went down to the truck and
78 examined that area.

Q. What did your examination of the truck disclose, if anything? A. It had a black water hose stuck in the gasoline tank, and the other end was leading down into a water pail.

Q. And anything else, sir? A. The odor of gasoline in the pail, but the gas had not started to run.

* * * * * *

Q. At the time, did you have occasion to talk to the Defendant Butler, sir? A. Yes, I talked to Butler, and Butler told me that he had been in the car for about two hours, and the motor was not running; he had fell asleep in the car.

Q. Did you ask him, sir, where he lived? A. Yes, sir.

Q. Do you recall where he said he lived? A. No, sir, not now.

Q. Will you examine that document in front of you, sir, for the purpose

of refreshing your recollection as to what answer he might have given to you?

79 A. 425 12th Street, N.E.

Q. In the District of Columbia? A. Yes, sir.

Q. How far is that, sir, from the 1000 block of Second Street, N.E., approximately? A. It would be ten blocks to the east and six blocks to the south.

Q. Did you have occasion to talk to the Defendant Claude R. Allen? A. Yes, sir.

Q. Did you ask him where he lived, sir? A. Yes, sir.

Q. What did he tell you? A. He told me he lived in northeast, but I don't recall the address.

Q. Could you refresh your recollection again, sir, as to what address he might have given you? A. 1002 8th Street, N.E.

Q. How far, sir, is that from the 1000 block of -- A. Six blocks from the 1000 block of Second.

Q. And did you have occasion to ask the Defendant Dorman where he lived? A. Yes, sir.

Q. And what did he tell you, sir? A. He told me that he lived at 56 L Street in the unit block, N.W.

80 Q. And how far is that from the 1000 block of Second Street, N.E.? A. It is approximately two blocks, sir.

* * * * * *

Q. Was the Defendant Dorman searched in your presence, sir? A. Yes.

Q. Where was it with respect to the place that the Buick was parked that he was searched? A. When I say, searched, I don't mean -- he was

81 padded down for a weapon, as we do all people in question.

Q. Officer Kunmann didn't go into his pockets? A. No, sir.

Q. In what area was he padded down? A. Standing behind the Buick.

Q. After he was padded down, what was he told to do, if anything? A. I called the Defendant Dorman out into the center of the street, opposite the Buick, where I was standing at that time.

Q. Is that the time that Officer Kunmann padded him down? A. No, sir; he had padded him down before that.

Q. You saw Officer Kunmann pad him down? A. Yes, sir.

Q. Will you state whether or not after Officer Kunmann padded him down, anything was picked up? A. No, sir.

Q. You didn't see Officer Kunmann pick anything up? A. He did out in the center of the street.

Q. Did you see Officer Kunmann pick anything up from the street? A. Yes, sir.

Q. Where was it that he picked something up? A. In the center of
82 the street where I was talking to the Defendant Dorman.

Q. You had been talking to him at that place? A. Yes, sir.

Q. At the time that Kunmann picked something up, did you observe what it was, sir? A. It was a white envelope.

Q. Did he look inside of it? A. Yes, sir.

Q. And what was in it, if you know? A. The title to the Buick.

* * * * * *

103 Washington, D.C.
May 6, 1957

* * * * * *

104 ALBERT JOHN KUNMANN

was called as a witness by and on behalf of the Government * * *

DIRECT EXAMINATION

BY MR. HANNON:

* * * * * *

105 Q. And were you so assigned, sir, on December 21, 1956? A. Yes, sir.

Q. Directing your attention, sir, to that date, December 21, 1956, at about 4:00 a.m. in the morning, I wonder, would you tell the Court and ladies and gentlemen of the Jury where you were at that time? A. We were proceeding north in the 1000 block of Second Street with Detective Sergeant Shelton, myself, in an Auto Squad cruiser.

Q. Now, at that time, sir, did you observe anything of an unusual

nature in that 1000 block of Second Street, sir? A. Yes, sir. Just north of the intersection of Second and K Streets, N.E., we observed a truck parked on the west side of the curb, with a man standing alongside the truck, was a rubber hose extending from the gas tank of the truck to a water bucket which was resting on the roadway.

Q. Now, Officer Kunmann, you said there was a man standing alongside the truck; is that correct? A. Yes, sir.

* * * * * *

Q. Would you identify him, please, or point to him? A. His name is Lawrence Dorman.

* * * * * *

106 Q. Officer Kunmann, did you observe anybody else or anything else at that time? A. Yes, sir. Parked behind the truck, on the west side of the street was a 1946 Buick, black, four-door sedan, bearing D.C. registration AW-42-46; and Butler, Thomas Butler was sitting behind the wheel of that automobile.

* * * * * *

107 Q. Would you state whether or not the Buick was operating at the time? A. The automobile was parked. I observed the exhaust fumes coming from the exhaust pipe as we came alongside, or just to the rear of it and stopped the cruiser. Just about the time we stopped the vehicle lurched forward a couple feet, maybe two and a half or three feet, not over that.

* * * * * *

Q. Did you see anybody else, sir? A. Yes, sir. Claude Allen was standing directly alongside of the centerpost of the car; that is, of the Buick,

108 when I first observed him. As we stopped, that is, just about the time the Buick lurched forward, and Allen turned and started walking north in the 1000 block of Second Street.

* * * * * *

MR. HANNON: May the record show, Your Honor, that Officer Kunmann identified the Defendant Allen?

* * * * * *

Q. In what position was the police cruiser stopped with respect to where the '46 Buick was parked? A. The rear of the cruiser which was headed north was just a few feet past the rear of the Buick, which was headed or parked in a southerly direction.

Q. Now, as the cruiser came to a stop, sir, would you tell us first what Defendant Dorman did, if anything? A. He left the position he was
109 standing alongside the truck and started walking north in the roadway, and while in between the Buick and the truck, cut to his left to get up on the curbing or get out of the roadway and continued walking north along the foot path.

* * * * * *

113 Q. Officer Kunmann, did you have occasion to talk to either or all of the Defendants at that time? A. On the scene, sir?

Q. On the scene, yes, or later. A. Beg pardon, sir?

Q. On the scene or later. A. We talked to them at a greater extent later at the Auto Squad office.

Q. Start with Defendant Dorman. Did you talk with him, sir? A. Yes,
114 sir.

Q. What did he have to say? A. He admitted that all three men were together earlier in the evening.

Q. When you say "all three men," you mean Dorman, Butler and Allen? A. That is right.

Q. The three Defendants in this case? A. Yes, sir. They were together in the vicinity of North Capitol and L, I believe it was; and then they had split up and each going their own individual ways.

Q. And about what time was it that they split up? Did he say that, sir? A. I don't believe he said an exact time, sir. He said: Earlier in the evening we split up.

He said -- then continued -- he said -- Dorman said he just happened to meet Allen in the 900 block of Second Street.

Q. What was that again? He just happened to meet Allen? A. That was later on in the evening.

Q. What time was it when you saw them on the scene, sir? A. Ap-

proximately 4:00 a.m., sir.

Q. Now, did you talk with the Defendant Allen? A. Yes, sir.

115 Q. What did he have to say, sir? A. He also admitted being with the other two Defendants earlier in the evening, and collaborated the statement that they had split up; and he said he was walking through the viaduct of K Street, N.E. and met Dorman in the 900 block of Second Street.

Q. Did he say where he and Dorman were going? A. They started walking north on Second Street; I believe they were both headed for their homes. Dorman stated then that the reason that he was so far behind Allen -- he was about forty-five, fifty feet behind him -- is that he had a bad foot and couldn't walk as fast as Allen.

Q. Did they say anything about Butler being on Second Street at four o'clock in the morning at the time you came on the scene? A. No, sir. They said they didn't know he was in the car.

Q. They didn't know he was in the car. Now, did you have occasion to talk to the Defendant Butler? A. Yes, sir.

Q. What did Defendant Butler tell you? A. He verified that all three were together earlier in the evening; and he said that he got into the automobile because he was cold and wanted a place to sleep. We questioned him about the car lurching forward; and he said while he was sleeping, his foot must have

116 hit the gas pedal which also has the starter on it.

* * * * * *

146 MR. HANNON: The Government rests its case.

* * * * * *

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

MR. COHEN: At this time, Your Honor, I would like to make what I think is an appropriate motion and a deserving motion, one for the dismissal of the indictment as to Defendant Allen, sir.

THE COURT: Not so loud, sir.

MR. COHEN: And I have prepared a motion to that effect with points and authorities.

THE COURT: Have you furnished the Government with a copy?

147 MR. COHEN: Yes, sir, I am right now.

THE COURT: Unless you have something specific to present to the Court, the Court is prepared to rule.

MR. COHEN: I do have something specific to present.

THE COURT: All right, what is it?

MR. COHEN: I would at this time request that I might make argument to the Court for perhaps fifteen minutes.

THE COURT: I don't think argument is needed. If you have anything to say, I will hear it now. I don't want to cut you off. I have heard all the evidence. I know what the essentials are.

MR. COHEN: I might apprise Your Honor, then, of this, if I may:

The statute, which I am sure Your Honor is familiar with, does speak of take, using and operating, and so on. And it uses the word, the conjunction "and shall cause to operate, drive, and so on, or shall operate or drive."

I would in the first instance say that those are two necessary elements which must be established.

The proof adduced, in my mind, is at most completely circumstantial; and I have a line of cases which I have cited in my motion, Your Honor, to the clear effect that before we can make out unauthorized use under the wording of our statute, we must, as a minimum requisite, show possession,

148 and that you cannot have use without possession.

Now, this isn't a mere legal technicality in my mind. I have read the cases and prepared very thoroughly. And as to the question of whether or not the circumstances of the so-called apprehension of the Defendants warrants the inference -- and it is not a presumption but an inference of guilt, such as could convince the minds of the Jury to find him guilty -- I would say that without possession, I am prepared to show Your Honor cases which I have laid aside, without that requisite possession, you can draw no such inference. In which case, no evidence would exist showing that Defendant Allen, who so far has been unconnected except by physical location, committed or could have committed --

THE COURT: Not so loud, please.

MR. COHEN: I am sorry.

THE COURT: I don't think it is beneficial to you to be heard arguing this.

I see your point, and I think you are very zealous in your presentation of this case.

The Court's position in this case is this is a case in which the matter should be submitted to the Jury under instruction as to the circumstantial evidence; and the Court also feels that the aiding and abetting instruction is proper in this case.

The Court would be naive not to submit this case to the Jury. The Court
149 is not ruling on the questions of fact. Those are for the Jury. But certainly the Court would not be impressed with the argument that there is nothing to submit to the Jury here in this case.

Of course, you are making this motion at the close of the Government's case; and as you well know, it is Hornbook rule that at this posture of the case, when a motion of this kind is made, all evidence and all implications arising therefrom are to be construed most strongly against the Defendant.

The Court's view of the matter is that the case should be submitted to the Jury on proper instructions covering circumstantial evidence and aiding and abetting instruction is likewise proper and should be submitted to the Jury.

* * * * * *

154 THOMAS McKINLEY BUTLER

was called as a witness in his own behalf * * *

* * * * * *

160 CROSS EXAMINATION

BY MR. HANNON:

* * * * * *

162 Q. You didn't do that either. All right. Now, on the 20th, were you working as a painter on that day, Mr. Butler? A. On the 20th, yes, sir, I did painting.

Q. For whom were you painting? A. Mrs. Allen, the mother of Claude Allen.

Q. For whom? A. Mrs. Allen is all I know. I don't know.

Q. Mrs. Claude Allen, did you say? A. No.

Q. Is that Allen's mother? A. I think that it is, yes.

Q. How long have you known him? A. I have known Claude Allen approximately -- I would say eight years, about eight, or something like that.

Q. You and he were together on the 20th; is that right? A. Earlier in the day, yes, sir.

* * * * * *

174 MR. COHEN: I likewise rest for the Defendant Allen, Your Honor.

* * * * * *

182 THE COURT: Will counsel please approach the bench.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

THE COURT: The Court wishes to advise you all regarding the instructions.

The Court will instruct the Jury on the nature of the offense as follows:

The Defendants are charged in a single-count indictment with unauthorized use of a motor vehicle. The offense of unauthorized use of a motor vehicle is defined in the District of Columbia Code for 1951, Title 22, Section 2204, as amended. The pertinent statute provides as follows:

Then I shall read the pertinent portion of the statute.

Then going on:

The elements of the offense of unauthorized use of a motor vehicle are as follows: That the defendant, without the consent of the owner, took the vehicle in question and used, operated or removed it from a public street or any other place mentioned in the law above quoted, for his own profit, use or purpose.

Then of course, the instruction as to the burden of proof being on the Government to prove all the essential elements of the charge.

Then the Court will give this instruction. Well, the Court will give

183 the instruction on circumstantial evidence which is the stock instruction.

MR. COHEN: Your Honor, I have not heard that stock instruction. If it is short, I would like you to read it to me.

THE COURT: It is pretty long, but I will read it to you.

"In criminal cases, there are two types of evidence. One type is known as direct evidence, and another type of evidence is known as circumstantial evidence.

"By direct evidence is meant evidence of eye witnesses who saw the act perpetrated. In this case, there is no eye witness who claims to have seen the Defendants commit the crime with which they are charged,namely, unauthorized use of a motor vehicle. Consequently, there is no direct evidence in this case tending to prove the Defendants guilty.

"The second type of evidence is circumstantial evidence. Circumstantial evidence consists of circumstances from which the Defendants' guilt may be inferred by the Jury.

"One cannot say that either of the two types of evidence is
184 more reasonable or stronger than the other. Circumstances may sometimes lead to an erroneous inference. On the other hand, at times, if the circumstantial evidence is sufficiently strong, it may be as convincing as direct evidence, because circumstances speak for themselves, and if they are strong enough, they may at times lead to a definite conclusion.

"The law permits conviction of a criminal offense on circumstantial evidence alone. In order, however, to justify a verdict of guilty on the basis of circumstantial evidence, the circumstantial evidence must be of such degree and character as to point to the Defendants' guilt and also it must be inconsistent with the Defendants' innocence.

"In fact, in order to justify a verdict of guilty on the basis of circumstantial evidence alone, such circumstantial evidence must be inconsistent with any other theory except the theory of the Defendants' guilt. If the circumstantial evidence is consistent with the Defendants' guilt, but is also consistent with the Defendants' innocence, or, in fact, any other theory
185 except the theory of the Defendants' guilt, then the Defendants must be found, not guilty."

MR. COHEN: Thank you, Your Honor.

MR. HANNON: Your Honor, may I say I think the Court's instruction with respect to circumstantial evidence should be limited to the Defendants Dorman and Allen, because there is testimony, Your Honor, by the police officers, the Defendant Butler was behind the wheel, the motor was running, and the fact that the automobile did move.

THE COURT: That is disputed. I would be invading the province of the Jury on that. I think the whole thing justifies submission as to all three.

MR. HANNON: Does Your Honor feel that the instruction on circumstantial evidence as to all three Defendants would tend to mitigate the testimony of the officers regarding Butler being behind the wheel by saying it is solely circumstantial?

THE COURT: I don't believe that it will.

MR. HANNON: I think the instruction says there is no direct testimony, direct evidence. But that is with respect to Allen and Dorman.

THE COURT: I don't believe that I would change that. I think I will give that the way it is.

I am going to give the aiding and abetting instruction, which is as
186 follows:

"You are instructed that in the District of Columbia it is the law, as provided in Section 105, Title 22, District of Columbia Code, that all persons aiding or abetting a principal offender shall be charged as principal.

"To aid and abet, as the term is used in said statute is meant to assent to an act, to lend to it countenance and approval either by active participation in it or by in some manner advising or encouraging it.

"In this case, if you find that the Government has shown beyond a reasonable doubt that the offense charged in the indictment has been committed and that it has also shown beyond a reasonable doubt that any particular

defendant aided and abetted in the commission of said offense, this will be sufficient to justify you in finding said particular defendant guilty of said offense.

"You are consequently instructed in connection with this instruction on aiding and abetting that if you find beyond a reasonable doubt that any particular defendant did aid or abet the principal defendant in the crime of an
187 unauthorized use of motor vehicle, then that particular defendant would be guilty of said crime.

"On the other hand, if you find beyond a reasonable doubt that any particular defendant did not aid or abet the principal offender in the said crime of unauthorized use of a motor vehicle, with which Defendants are charged in this case, then in that event this instruction on aiding and abetting would not be applicable to that particular Defendant in this case, and in that event, you are instructed that you would be required to disregard said instruction as to that particular defendant.

"It is for you the Jury to determine from all the evidence and under all the Court's instructions as to the law whether either of the defendants were guilty or not guilty of aiding and abetting a principal offender in the crime of unauthorized use of a motor vehicle."

MR. COHEN: I would have one question. I believe Your Honor, in reading, to paraphrase, said: If you should find that the defendant beyond a reasonable doubt did not -- I believe that is the wrong burden.
188 The burden is on the Government to establish beyond a reasonable doubt --

THE COURT: Which?

MR. COHEN: May I just point? I refer to this portion of the instruction here.

THE COURT: "If proved beyond a reasonable doubt the defendant

did not aid..."

MR. COHEN: You have the negative. They have the burden of establishing beyond a reasonable doubt.

THE COURT: You can make a record on that.

MR. COHEN: Fine. The record will so indicate.

THE COURT: On the proffered instruction, the Court will deny the proffered instruction.

MR. COHEN: Would Your Honor care to hear a brief discussion on this? I have cases.

THE COURT: No.

MR. COHEN: In the case of Epps v. United States -- and the citations for these will appear in the motion which is already a part of the record filed by the Defendant -- which was a case of unauthorized use, which based itself on circumstantial evidence. The Court there did discuss the aspect of possession, and that it was a requisite element.

The same can be said of Gilbert v. United States.

The same can be said of Tractenberg v. United States.

Further, in Barfield v. United States -- that is a 1956 case, not
189 of our jurisdiction -- it was held that an instruction regarding possession would be required when that particular case dealt with transporting a stolen vehicle over a state line. Facts very similar to our own here.

I would quote from that case.

> "Here the possession, if it exists, must be the manual driving of the automobile."

That is at Page 942.

In our case, in regard to this proposed instruction, we don't even go that far in our request to Your Honor.

THE COURT: I think I can end this rather reasonably by saying that we are operating under a specific statute and the Court will instruct the jury strictly in accordance with the provisions of this specific statute.

It seems to the Court that it is a very clear instruction on unauthorized use of a motor vehicle, which instruction the Court has already read to counsel.

MR. COHEN: I just might conclude with this. In which case, Your Honor, I would like to clear with you now the argument I intend to make to the Jury, that the necessary elements are either taking or driving and must be shown.

THE COURT: The element is that the defendant, without the consent of the owner, took the vehicle in question and used and operated or removed it.

MR. COHEN: That is correct, Your Honor.

190 THE COURT: Used, operated or removed it.

All right.

* * * * * *

224 COURT'S CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the Jury, the case upon which you are sitting as jurors is the case of the United States v. Lawrence Dorman, Thomas M. Butler and Claude R. Allen.

In these instructions, I shall at times refer to Lawrence Dorman, Thomas M. Butler and Claude R. Allen as the Defendants.

I shall now read to you the indictment of the grand jury in which is set forth the charge against the Defendants. The grand jury indictment reads as follows, and I quote:

> "On or about December 21, 1956, within the District of Columbia, Lawrence Dorman, Thomas M. Butler and Claude R. Allen feloniously did take, use, operate and remove the automobile of Evelyn M. Johnson, in the custody of Jesse M. Ricks, from a lot and did operate and drive said automobile for their own profit, use and purpose without the consent of Evelyn M. Johnson, the owner of said automobile, and without the consent of Jesse M. Ricks."

225 Now, you have heard the evidence and the statements and arguments of counsel for the prosecution and for the Defendants; and it now becomes your duty to determine whether the Defendants are guilty or not guilty of the offense with which they are charged.

Before discussing the charge against the Defendants in detail, I shall first summarize for you the general principles of law that must govern you and guide you in determining the issues in this case.

It is the function and the duty of the Jury to determine the issues of fact. It is the duty of the Court to instruct you ladies and gentlemen of the Jury as to the principles and rules of law governing the case. You are bound and obligated to follow the Court's instructions as to the law and to take the law from the Court. On the other hand, ladies and gentlemen of the jury, you are the sole judges of the facts, and you must determine the facts for yourselves, solely upon the evidence presented at this trial.

The fact that a defendant is charged with a crime and has been indicted is not to be taken as any indication of his guilt. The sole purpose of an indictment is to bring a Defendant before the Court.

An indictment is merely the machinery and the procedure provided by law for placing a defendant on trial. You will bear in mind this instruction as to the character and purpose of an indictment, in connection
226 with the specific instructions concerning the indictment in this case which the Court will give you later during the course of these instructions.

When the Defendants in this case were arraigned, they pleaded, not guilty, to the indictment, the indictment containing only one count. Every defendant in a criminal case is presumed to be innocent. This presumption of innocence attached to the defendant throughout the trial.

Now, having given you the foregoing instructions as to the general principles of law which you are to bear in mind, I shall now instruct you as to the particular offense alleged to be involved, and the specific law applicable to said alleged offense.

The Defendants are charged in the single count of the indictment with unauthorized use of a motor vehicle. The offense of unauthorized use of a motor vehicle is defined in the District of Columbia Code for 1951 under Title 22, Section 2204, as amended. The pertinent statute provides as follows, and I quote from the statute:

"Any person who, without the consent of the owner, shall take, use, operate or remove or cause to be taken, used, operated or removed from a garage, stable or other building or from any place or locality on a public or private
227 highway, park, parkway, street, lot, field, enclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use or purpose, shall be punished as stated in the statute."

That ends the reading of the statute, ladies and gentlemen of the Jury, and the Court goes on with the instruction.

The elements of the offense of unauthorized use of a motor vehicle are as follows:

That the Defendant without the consent of the owner took the vehicle in question and used, operated, or removed it from a public street or any other place mentioned in the law above quoted for his own profit, use or purpose.

The burden of proof is on the Government to prove the Defendants guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the Defendants have committed every element of the offense with which they are charged, the Jury must find the Defendants not guilty.

I said a moment ago that the burden is on the Government to prove the Defendants guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond any doubt whatsoever. It means proof to a moral certainty, and not necessarily proof to an absolute or mathematical certainty.

228 By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourself, and not just any whimsical speculation or any capricious conjecture.

Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all the evidence, you can say to yourself that you are not satisfied of the Defendants' guilt, then you have a reasonable doubt.

On the other hand, if after such impartial comparison and consideration of all the evidence, you can truthfully and candidly say to yourself that you have an abiding conviction of the Defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is proof which will result in an abiding conviction of the Defendants' guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charge against the Defendants beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses who have testified before you, and take into account all the circumstances concerning which testimony has been introduced.

229 You are the sole judges of the credibility of the witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which any witness should be credited. And in reaching a conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you may consider the demeanor and the behavior of the witness on the witness stand, the witness' manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of this case.

All of these matters, as well as any other factors that appear to you as having a bearing on the matter, you may consider and weigh in determining what witnesses to believe, and the extent to which to credit them.

If you find that any witness wilfully testified falsely as to any material fact concerning which the witness could not in your judgment have possibly been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness or any part of the testimony of such witness which you may see fit to disregard.

230 You are instructed that in the District of Columbia it is the law, as provided in Section 105 of Title 22 of the Code of the District of Columbia for 1951, as amended, that all persons aiding or abetting a principal offender shall be charged as principal.

To aid and abet, as the term is used in said statute, is meant to assent to an act, to lend to it countenance and approval, either by active participation in it or by in some manner advising or encouraging it.

In this case, if you find that the Government has proved beyond a reasonable doubt that the offense charged in the indictment has been committed, and that it has also shown beyond a reasonable doubt that any particular Defendant aided and abetted in the commission of said offense, this will be sufficient to justify you in finding said particular Defendant guilty of said offense.

You are consequently instructed, in connection with this instruction on aiding and abetting, that if you find beyond a reasonable doubt that any particular Defendant did aid or abet a principal offender in the crime of unauthorized use of a motor vehicle, that particular Defendant would be guilty of said crime.

On the other hand, if you find beyond a reasonable doubt that any particular Defendant did not aid or abet a principal offender in the said crime, of unauthorized use of a motor vehicle, with which Defendants

231 are charged in this case, then and in that event, this instruction on

aiding and abetting would not be applicable to that particular Defendant in this case, and in that event, you are instructed that you would be required to disregard said instruction as to that particular Defendant.

It is for you, the Jury, to determine from all the evidence and under the Court's instructions as to the law, whether either of the three Defendants was guilty or not guilty of aiding and abetting a principal offender in the crime of unauthorized use of a motor vehicle.

In criminal cases, there are two types of evidence: One type is known as direct evidence. The other type of evidence is known as circumstantial evidence.

By direct evidence is meant evidence of eye witnesses who saw the act perpetrated. In this case, there is no eye witness who claims to have seen the Defendants commit the crime with which they are charged, namely, unauthorized use of a motor vehicle. Consequently, there is no direct evidence in this case tending to prove the Defendants' guilt.

The second type of evidence is circumstantial evidence. Circumstantial evidence consists of circumstances from which the Defendants' guilt may be inferred by the Jury.

One cannot say that either of the two types of evidence is more reliable or stronger than the other. Circumstances may sometimes
232 lead to an erroneous inference. On the other hand, at times, if the circumstantial evidence is sufficiently strong, it may be as convincing as direct evidence, because circumstances speak for themselves; and if they are strong enough, they may at times lead to a definite conclusion.

The law permits conviction of a criminal offense on circumstantial evidence alone. In order, however, to justify a verdict of guilty on the basis of circumstantial evidence, the circumstantial evidence must be of such degree and character as to point to the defendant's guilt, and also it must be inconsistent with the defendant's innocence.

In fact, in order to justify a verdict of guilty on the basis of circumstantial evidence alone, such circumstantial evidence must be

inconsistent with any other theory except the theory of the Defendant's guilt.

If the circumstantial evidence is consistent with the Defendant's guilt and it is also consistent with the Defendant's innocence, or, in fact, with any other theory except the theory of the Defendant's guilt, then the Defendant must be found not guilty.

In this case, two of the Defendants, namely, Defendants Dorman and Allen, did not take the witness stand.

You are instructed that no inference of guilt arises against any defendant because of his failure to testify as a witness in his own behalf.

233 A defendant is not under any obligation to testify when he is tried.

You are instructed that no unfavorable inference against any defendant is to be drawn from the fact that he, that is, said defendant, did not testify as a witness at this trial.

There is evidence here of former convictions of Defendant Butler of criminal offenses on previous occasions. This evidence must not be considered by the Jury in connection with the question of the guilt or innocence of Defendant Butler in this case. It may be considered by you ladies and gentlemen of the Jury only in connection with the credibility of the testimony of Defendant Butler. That is to say, only in connection with the question of the credibility of the Defendant Butler as a witness.

You should bear in mind that conviction of Defendant Butler of a criminal offense at some previous time is no proof that he, that is, Defendant Butler, is guilty of the offense with which he is now charged.

In this case, you have heard the testimony of police officers. You are instructed that in weighing the credibility of these officers, as well as any other witnesses in this case, you should consider the interest which the witness might have in the result of the case.

Where the witness has a direct personal interest in the result, there is a strong temptation to color, pervert or withhold facts. This

234 rule applies to the police officers as well as to all other witnesses in this case.

A police officer has testified that during the course of interrogation, the Defendants made certain admissions which would tend to reflect a confession of the offense charged. Accordingly, you, the Jury, are admonished that testimony concerning any oral statements or admissions should be received by you with caution.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The Court instructs you that if there is a conflict in the evidence in this case on any fact or circumstance tending to establish either the guilt or the innocence of the Defendants, a part of which is in favor of the theory of the Government, and a part of which is in favor of the
235 theory of the Defendants, and you should entertain a reasonable doubt as to which is true, then it is your duty in arriving at your verdict to adopt the evidence or the theory or the conclusion which is most favorable to the Defendants.

At times during the trial, the Court has been called upon to make rulings on certain legal matters. That is, on questions involving law. Rulings on questions of law are the concern of the Court solely. Your concern is solely with questions of fact, and with the application of the Court's instructions to the testimony and the other evidence in the case, as those instructions relate to your determination of fact.

Your verdict must not be influenced by the decision on matters of law made by the Court during the trial, except as those decisions are reflected in the Court's instructions to the Jury.

Throughout the trial, the Court has made rulings on the question as to whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings by the Court, and are not to draw any inferences from them. Whether evidence offered is admissible is purely a question of law for the Court's determination.

236 In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence. A ruling by the Court permitting testimony to be given or other evidence to be introduced is not to be considered by you, the Jury, as any indication as to what weight said testimony or other evidence may or may not have. What weight is to be given to evidence is strictly a matter for you, the Jury, to determine for yourselves. Nor does the Court pass upon the credibility of any witness who testified. A ruling by the Court permitting a witness to testify or give evidence is not to be considered by you, the Jury, as any indication as to what the credibility of that witness may or may not be. The credibility of a witness is likewise a matter for you, the Jury, to determine for yourselves.

On the other hand, as to any offer of evidence that was rejected by the Court, you, of course, must not consider that evidence; and as to any question to which an objection was sustained, you must not conjecture, or guess or speculate as to what the answer might have been or as to the reason for the objection or for the ruling of the Court.

In the trial of this case, there were instances when certain evidence related to words or actions of one of the Defendants, but did not relate to the words or actions of the other Defendants.

237 It may be difficult for you in considering the case for or against any one certain Defendant to disregard any evidence that does not relate to said Defendant; but that is your plain duty with respect to evidence, and you must try conscientiously to so treat such a situation.

As I have already instructed you, ladies and gentlemen of the Jury, you are to determine the facts for yourselves solely upon the evidence presented at the trial.

Now, in this connection, you are instructed that statements or arguments by counsel, the attorneys for the Government and for the Defendants, statements or arguments by the lawyers are not evidence and are not to be taken or considered as evidence.

Arguments by lawyers are made to assist you in analyzing and appraising and evaluating the evidence, and are to be so considered and so considered only by you.

Every case is to be determined without bias, prejudice or sympathy for or against either side, and solely upon the evidence of the witnesses under oath, the evidence and the Court's instructions as to the law.

You have now heard the Court's instructions. If in all these instructions, from beginning to end, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others.

238 But you are to consider all the instructions as a whole and to regard each in the light of all the others.

Now, ladies and gentlemen of the Jury, I want you to take this matter and consider it deliberately in the light of the instructions which I have given you, using the same ordinary common sense and ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your everyday life.

The Court has read and explained to you the offense with which the Defendants are charged in the indictment. It consists of one count. In this case, there are three Defendants. It is your duty to consider all the evidence as to each Defendant and to return a verdict as to each Defendant.

Your verdict as to each Defendant may be either, guilty, or, not guilty. As you, of course, know, your verdict as to each Defendant must be by unanimous vote.

Before commencing your deliberations, you will choose one of your number foreman. Whenever you shall have arrived at a verdict,

notify the Marshal, whereupon you will be escorted back to the courtroom to return your verdict.

You will please remain in your seats in order that the Court may
239 afford counsel for the Government and for the Defendants respectively an opportunity to approach the bench if they desire to do so.

Do counsel desire to approach the bench?

MR. HANNON: Yes, Your Honor.

THE COURT: You may do so.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

MR. HANNON: Your Honor, as I understand the law, if a person is found behind the wheel of a parked automobile, and the motor is running, that in and of itself is sufficient to charge them, to get a conviction of unauthorized use of a motor vehicle. That being so, Your Honor, the two police officers testifying that Butler was behind the wheel, that the motor was running, the exhaust, the car did move forward, I think it is particularly damaging to the Government's case for the Court to instruct on circumstantial evidence, that there is no direct evidence in this case.

THE COURT: That point has already been made, and the Court has already ruled on it. The Court will adhere to its ruling.

MR. COHEN: Satisfied.

* * * * * *

240 THE CLERK: Will the Foreman please rise.

Mr. Foreman, has the Jury agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK: What say you as to the Defendant Lawrence Dorman?

THE FOREMAN: Guilty.

THE CLERK: What say you as to the Defendant Thomas M. Butler?

241 THE FOREMAN: Guilty.

THE CLERK: What say you as to the Defendant Claude R. Allen?

THE FOREMAN: Guilty.

* * * * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

~~232~~ ~~229~~

No. 14,221

CLAUDE R. ALLEN, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

OLIVER GASCH,
United States Attorney.

JOSEPH HANNON,
LEWIS CARROLL,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 7 1958

Joseph W. Stewart
CLERK

No. 14,221

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Was not the case properly submitted to the jury under instructions covering circumstantial evidence and aiding and abetting?
2. Was not the jury instructed that the Government must prove appellant's guilt beyond a reasonable doubt?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,221

CLAUDE R. ALLEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

At about 4:00 a.m. on December 21, 1956, police officers were cruising in the 1000 block of Second Street, N.E., when they observed an automobile, with the engine running, parked about fifty feet behind a truck. They observed appellant standing near the right rear fender of the automobile (J.A. 16), and the co-defendant Dorman standing behind the truck. The co-defendant Butler was in the automobile. When the officers stopped their cruiser at the rear of the car, it "lunged forward about two feet and choked, stopped." (J.A. 17). Appellant and the co-defendant started to walk away and were recalled by the officers. The co-defendant Butler explained that he was tired and ill and, believing the convenient automobile to

that of his friend, he had entered and had fallen asleep (J.A. 17).

An examination of the truck revealed that a black water hose was stuck into the gasoline tank and the other end led into a water pail. The odor of gasoline was in the pail but the gas had not started to run. (J.A. 17).

The co-defendant Dorman was searched and, after the search, the title to the automobile was found in an envelope on the street at a point near the place of search. Each of the defendants told the officers that they lived sixteen, six and two blocks respectively from the point where the car was parked. They admitted being together earlier in the evening but stated that they had split up. Appellant told the officers that he had later met Dorman while walking in the 900 block of Second Street. He and Dorman walked together but Dorman related that he had walked behind appellant because of a bad foot. (J.A. 22). Both appellant and Dorman denied knowing that Butler was in the automobile (J.A. 22).

The officers contacted Jesse M. Ricks, who discovered that his car was missing. Mr. Ricks testified that he had parked and locked the automobile in the 400 block of Brown's Court, N.W. Ricks was purchasing this car from Evelyn M. Johnson and her title was in the glove compartment. In addition, the gas tank was approximately one-quarter full at the time it was parked. When Ricks recovered the vehicle, the tank was half full. (J.A. 13-14). In addition the glass in the little window on the driver's side was broken. There was evidence that the car had been started by the crossing of wires (J.A. 15).

The co-defendant Butler took the stand in his own defense. He testified that he had been drinking heavily and was ill. He was tired, so he entered the convenient automobile and went to sleep, believing the vehicle belonged to a friend. He awakened to the sound of the arrival of the officers.

STATUTE INVOLVED

District of Columbia Code (1951 Ed.), § 22-2204 provides:

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

ARGUMENT

The Instructions Were Proper

Appellant makes two contentions which relate to the instructions below. However, it is to be noted that appellant registered a "Satisfied" to the charge (J.A. 40), and is, therefore, foreclosed from raising these points on appeal. F.R.Crim. P. 30. In any event, there is no error.

In the first place, one of the co-defendants was apprehended sitting in the stolen vehicle. The motor was in operation and, when the officers approached, the automobile was seen to lurch, choke and stop. Thus, in submitting the case to the jury merely on circumstantial evidence, the court was treating appellant more favorably than the circumstances warranted (See J.A. 40). Appellant concedes that verdicts may rest on circumstantial evidence (Br. p. 2), and he registers no objection to the instructions on circumstantial evidence given in this case (J.A. 35-37). Here, the officers found a man in an automobile at 4:00 a.m. The motor was running and as they approached, the officers observed the car to move. Appellant was seen at the rear of the car and was seen to move away as the officers approached. The third co-defendant was at the rear of a truck into which

a hose was inserted. The pane of a window was broken and the title—which had been placed in the glove compartment—was found in street after one of the co-defendants was searched. On these facts, the case was properly submitted to the jury and the verdict indicates that the jury found the evidence to "be of such degree and character as to point to the defendant's guilt, and also . . . inconsistent with the defendant's innocence." (See J.A. 35). See *Lanham* v. *United States,* 87 U.S. App. D.C. 357, 185 F.2d 435 (1950).

Appellant argues that possession is an element of the crime involved. Such is not the case even though the unexplained possession of recently stolen property creates a prima facie showing of criminality. *Epps* v. *United States,* 81 U.S. App. 244, 157 F.2d 11 (1946). Rather, the Government must prove beyond a reasonable doubt that the accused, without the consent of the owner took the vehicle in question, and used, operated, or removed it from a public street or any other place mentioned in the statute for the own profit, use or purpose of the accused. (See J.A. 32). And certainly possession is not required by one who aids or abets the principal. In general see *Williams* v. *United States,* 94 U.S. App. D.C. 219, 215 F.2d 35 (1954); *Gilbert* v. *United States,* 94 U.S. App. D.C. 321, 215 F.2d 334 (1954); *Patalas* v. *United States,* 87 U.S. App. D.C. 379, 185 F.2d 507 (1950); and *Proctor* v. *United States,* 85 U.S. App. D.C. 341, 342, 177 F.2d 656 (1949).

It is also maintained that the trial court erred in instructing that if the jury should find beyond a reasonable doubt that appellant did not aid or abet a principal offender, the instructions on aiding and abetting would not apply (Br. p. 7-8; J.A. 34-35). However, when the charge is read as a whole it is quite clear that the jury was instructed that the Government must prove appellant's guilt beyond a reasonable doubt (J.A. 31, 32-33, 34, 35, 37). Thus, there is no cause to reverse the judgment of conviction. See *Opper* v. *United States,* 348 U.S. 84, 95.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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